BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GALE A. COOPER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,019,518
AGCO CORPORATION	)	
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the February 29, 2008, Award entered by Administrative Law Judge Bruce E. Moore. The Workers Compensation Board heard oral argument on June 20, 2008, in Wichita, Kansas.

APPEARANCES

Phillip B. Slape of Wichita, Kansas, appeared for claimant. Larry Shoaf of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

The parties agreed claimant sustained a work-related accident on June 17, 2004. In the February 29, 2008, Award, Judge Moore determined claimant sustained an additional five percent permanent impairment to his low back as a result of the accident and, therefore, the Judge awarded claimant permanent partial disability benefits for a 55.4

percent work disability.[1] The Judge based claimant's work disability upon a 49.3 percent task loss and a 71.5 percent wage loss, which when averaged together resulted in a 60.4 percent permanent partial disability. After deducting five percent for preexisting functional impairment,[2] the Judge awarded claimant permanent partial disability benefits under K.S.A. 44-510e for a 55.4 percent work disability.

Respondent and its insurance carrier (respondent) contend Judge Moore erred. Respondent argues claimant did not sustain any additional permanent impairment or work disability as a result of the June 2004 accident and, therefore, no permanent partial disability benefits should be awarded. In the alternative, should claimant be entitled to receive permanent disability benefits, respondent submits those benefits should be based upon a 20 percent work disability. Respondent's position is summarized, as follows:

> Based on the stipulations, claimant has not sustained her *[sic]* burden of proof to demonstrate that he has a permanent impairment or set of restrictions after the accident, greater than he had before the accident. It is submitted that no permanent partial disability is owed. If the Court determines otherwise, it is submitted that the impairments and work disability aspects as presented by respondent are more credible and persuasive for the reasons stated above. Appellant/respondent submits that work disability, if averaged between task losses between the two vocational experts as applied by the work restrictions and testimony of Dr. Fevurly, would be 20%.[3]

Claimant does not deny that he experienced right hip symptoms and a right footdrop before his June 2004 accident. But claimant asserts his June 2004 accident worsened his low back to the extent he required surgery. In his brief to the Board, claimant argues he has a 15 percent functional impairment, as opined by his medical expert, Dr. George G. Fluter, and a 79 percent task loss based upon Dr. Fluter's opinion. At oral argument before the Board, claimant requested the Board to increase his functional impairment to 15 percent but otherwise affirm the Award.[4] Finally, claimant argues respondent and its insurance carrier stipulated claimant would be entitled to receive a work disability in this claim.

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[1] A permanent partial disability under K.S.A. 44-510e greater than the whole person functional impairment rating.

[2] See K.S.A. 44-501(c).

[3] Respondent's Brief at 11 (filed Apr. 21, 2008).

[4] Claimant's counsel specifically stated he was not challenging the Judge's finding that he had a five percent whole person functional impairment before the June 17, 2004, accident.

The only issues before the Board on this appeal are whether claimant sustained any additional injury or impairment as a result of his June 17, 2004, accident and, if so, the resulting permanent disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant, now in his mid 50s, began working for respondent in 1997. On June 17, 2004, after jerking on a large part that he was welding, claimant felt something snap in his back and he experienced the immediate onset of pain in his back that radiated down into his right leg. The parties stipulated claimant sustained personal injury by accident that arose out of and in the course of his employment with respondent.

Following the June 2004 accident, claimant received chiropractic treatment from his personal chiropractor, Dr. Bruce M. Skiles, and medical treatment from Dr. Aiyenowo, Dr. Duane Nelson, and Dr. Paul Stein. Ultimately, in October 2005, Dr. Raymond Grundmeyer operated on claimant's low back and performed a two-level laminectomy and fusion with hardware at L3-4 and L4-5. Dr. Grundmeyer released claimant from treatment as of September 12, 2006.

Despite the June 2004 accident, claimant continued to work for respondent in an accommodated position until September 20, 2004, when his work restrictions were modified. And, pursuant to a collective bargaining agreement, respondent terminated claimant's employment on September 20, 2005, as he had not worked for a year. Sometime after receiving a medical release from a Dr. Xavier Ng in October 2006, claimant reapplied for employment with respondent. Claimant's testimony is uncontradicted he did not receive a response to his job application.

When claimant testified at his September 2007 regular hearing, he had not returned to work in any capacity but he had been approved for Social Security disability benefits. At the same hearing, claimant introduced a list of the contacts he had made with potential employers. Those contacts began in November 2006 and continued through April 2007, when he began receiving Social Security disability benefits.[5] Claimant did not conduct any job search after April 2007.

Claimant does not deny that before the June 2004 accident he had pain in his right hip and a right footdrop. But he thought those symptoms were from a pinched nerve in his

[5] Fevurly Depo., Ex. 2.

hip. Claimant also testified the pain he experienced from the June 2004 accident was located about three inches above his belt line in the middle of his spine and it radiated down into his right calf. Accordingly, the pain claimant experienced after the June 2004 accident was different than what he experienced before.

At his attorney's request, claimant was examined and evaluated in December 2006 by Dr. George G. Fluter, who is board certified in physical medicine and rehabilitation. The doctor rated claimant as having a 15 percent whole person functional impairment rating under the AMA *Guides*[6] as he believed claimant fell somewhere between the third and fourth DRE (Diagnosis-Related Estimates) categories regarding the lumbosacral spine. The doctor considered claimant's structural deficits as used in the *Guides* range of motion method of assessing impairment to determine which DRE category best represented claimant's impairment.[7] Dr. Fluter testified, in part:

> Q. (Mr. Shoaf) What in table 75 [of the AMA *Guides*] caused you to determine structural impairments?
>
> . . . .
>
> A. (Dr. Fluter) . . . It is down in the section IV, spinal stenosis, segmental instability, spondylolistheses, fracture, or dislocation, operated on. D is a single-level spinal fusion with or without decompression with residual signs or symptoms. The surgery that he had done was L3 through L5 laminectomy with decompression with lumbar L3 through L5 posterolateral fusion. So he had decompression and fusion. So that would fall under IV, Category D in table 75. If you go over to the lumbar spine, that is 12 percent. But it was L3 through L5. You actually have two additional levels that are involved. So E says multiple levels, operated on, with residual, medically documented pain and rigidity with or without muscle spasm, that would be 1 percent per level. So that is where it becomes 14 percent, because he had several levels done. So based on the structural impairments, that would fall in that table to a 14 percent.
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> Q. Okay. So 14 percent was the mere fact that he had a multiple-level fusion?
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> A. That is correct.[8]

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[6] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[7] Fluter Depo. at 7.

[8] *Id.* at 26, 27.

Using a September 2006 functional capacity evaluation, Dr. Fluter also formulated the permanent work restrictions claimant should now observe. The doctor, in general, felt claimant should be limited to sedentary work, which would limit his lifting, pushing, pulling, and carrying to 10 pounds occasionally and only negligible weight frequently. In addition, claimant's standing, walking, climbing, stooping, kneeling, and crouching should be limited to an occasional basis and crawling completely avoided.

Claimant's attorney hired vocational expert Jerry D. Hardin to evaluate the work claimant performed in the 15-year period before his accident and to list the individual tasks claimant performed in that work. Dr. Fluter reviewed the task list prepared by Mr. Hardin and determined claimant should no longer perform 15 of the 19 nonduplicative tasks, or 79 percent.

Respondent and its insurance carrier referred claimant to occupational medicine physician, Dr. Chris D. Fevurly. The doctor examined claimant in September 2007 and found that claimant sustained a five percent whole person functional impairment under the AMA *Guides* as a result of his work injury. Although Dr. Fevurly does not believe claimant presently has any radiculopathy the doctor does not doubt claimant had radiculopathy before the June 2004 accident. The doctor testified, in part:

> Q. (Mr. Shoaf) Doctor, what is your opinion with regard to the permanent impairment for Mr. Cooper?
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> A. (Dr. Fevurly) I think the impairment resulting from the work event is a category II DRE lumbosacral impairment or 5 percent whole person impairment. Now, if he has radiculopathy, which at this point it does not appear that he has current radiculopathy but I don't think there's any doubt that he had radiculopathy prior to, and that would be a category III DRE lumbosacral impairment. So in other words, I think that it's reasonable to accord a 5 percent whole person impairment from the work event with the information we currently have; although you could certainly say that there's no change.
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> Q. Doctor, with regard to the 5 percent, did you list that in your report as resulting from an aggravation of preexisting, chronic, low back pain?
>
> A. Right.[9]

Dr. Fevurly believed claimant's five percent impairment resulted from an aggravation of preexisting, chronic, low back pain.

[9] Fevurly Depo. at 23, 24.

Dr. Fevurly also found that claimant should observe permanent work restrictions, which include no lifting greater than 40 pounds on an occasional basis and avoiding prolonged or repetitive bending and stooping. But Dr. Fevurly feels claimant should have been observing those restrictions anyway and working in the medium labor category before his June 2004 accident due to the history of footdrop.

Claimant advised Dr. Fevurly that in either 2003 or 2004 he experienced a pinched nerve that caused a right hip ache and the right footdrop. But claimant also reported his right footdrop eventually resolved after receiving an epidural in 2004. The fact that claimant was having right hip pain is supported by the May 2004 medical records respondent obtained from Dr. Don W. Hodson, which Dr. Fevurly summarized. Those records also indicated claimant had a right leg problem that seemed to come and go. On May 18, 2004, Dr. Hodson felt claimant had a partially herniated L4-5 disc and, therefore, the doctor recommended an MRI, which claimant underwent on May 20, 2004, and possible epidural steroid injections by Dr. Skiles.

After reviewing the task list prepared by Mr. Hardin, Dr. Fevurly indicated claimant lost the ability to perform six of the 19 nonduplicative tasks, or approximately 32 percent. Likewise, the doctor reviewed a task list prepared by Dan R. Zumalt, respondent and its insurance carrier's vocational expert, and indicated claimant lost the ability to perform one of the 13 nonduplicative tasks, or approximately 7.6 percent, considering the task descriptions provided by claimant. But considering the task descriptions provided by respondent, Dr. Fevurly concluded claimant had no task loss.

Considering the various opinions from the doctors concerning task loss, the Board affirms the 49.3 percent task loss found by Judge Moore. That task loss percentage is an average of the percentages indicated by Dr. Fevurly with the percentage indicated by Dr. Fluter.

The parties stipulated that on June 17, 2004, claimant injured his low back while working for respondent. And the greater weight of the evidence indicates claimant ultimately underwent back surgery for the injuries or aggravation he sustained in that accident.

The Board finds claimant has sustained a 10 percent whole person functional impairment as a result of his June 2004 accident. That is an average of the five percent functional impairment rating provided by Dr. Fevurly and the 15 percent rating provided by Dr. Fluter. The Board is not persuaded that either rating was more accurate than the other.

Because claimant has sustained an injury that is not included in the schedule of K.S.A. 44-510d, his permanent disability benefits are governed by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[10] and *Copeland*.[11] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job that the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that the worker's post-injury wage should be based upon the ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.[12]

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[10] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[11] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[12] An analysis of a worker's good faith effort to find appropriate employment after recovering from the work injury for purposes of the wage loss prong of K.S.A. 44-510e may no longer be applicable as the Kansas Supreme Court has recently held that statutes must be interpreted strictly and nothing should be read into the language of a statute as was done in *Foulk* and *Copeland*. See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007) and *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[13]

And the Kansas Court of Appeals in *Watson*[14] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[15]

The only evidence in the record regarding claimant's ability to earn wages comes from Mr. Hardin, who testified claimant retains the ability to earn $280 per week.

It is undisputed respondent was unable to accommodate claimant's permanent work restrictions. Likewise, it is undisputed claimant has not worked since leaving respondent's employment and has not looked for other employment since April 2007. The evidence establishes that claimant has failed to make a good faith effort to find appropriate employment and, therefore, beginning with the date he was released by Dr. Grundmeyer the Board imputes a post-injury wage of $280 per week for the permanent disability formula. Comparing claimant's pre-injury wage of $980.99 per week to $280 yields a 71.5 percent wage loss.

In conclusion, the Board finds claimant injured or aggravated his low back on June 17, 2004, which ultimately resulted in his October 2005 low back surgery and his termination from respondent's employment. Furthermore, the Board concludes claimant is entitled to receive the following disability benefits under K.S.A. 44-510c and K.S.A. 44-510e:

> (a) For the period claimant continued to work for respondent from June 17, 2004, through September 19, 2004, claimant is entitled to receive disability

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[13] *Copeland*, 24 Kan. App. 2d at 320.

[14] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[15] *Id.* at Syl. ¶ 4.

benefits for a five percent permanent partial disability, which represents his 10 percent whole person functional impairment less five percent for preexisting functional impairment;[16]

(b) For the period commencing September 20, 2004, claimant is entitled to receive 103.79 weeks of temporary total disability benefits; and

(c) For the period commencing September 17, 2006, claimant is entitled to receive permanent disability benefits for a 55.4 percent permanent partial disability, which represents claimant's 60.4 percent work disability (averaging the 49.3 percent task loss and the 71.5 percent wage loss) less five percent for preexisting functional impairment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[17] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the February 29, 2008, Award entered by Judge Moore, as follows.

Gale A. Cooper is granted compensation from Agco Corporation and its insurance carrier for a June 17, 2004, accident and resulting disability. Based upon an average weekly wage of $980.99, Mr. Cooper is entitled to receive the following disability benefits:

For the period ending September 19, 2004, Mr. Cooper is entitled to receive 13.43 weeks of permanent partial general disability benefits at $440 per week, or $5,909.20, for a five percent permanent partial general disability.

For the period from September 20, 2004, through September 16, 2006, Mr. Cooper is entitled to receive 103.79 weeks of temporary total disability benefits at $440 per week, or $45,667.60.

For the period commencing September 17, 2006, Mr. Cooper is entitled to receive 110.05 weeks of permanent partial general disability benefits at $440 per week, or

[16] See K.S.A. 44-501(c).

[17] K.S.A. 2007 Supp. 44-555c(k).

$48,423.20, for a 55.4 percent permanent partial general disability. The total award is not to exceed $100,000.

As of August 15, 2008, Mr. Cooper is entitled to receive 103.79 weeks of temporary total disability compensation at $440 per week in the sum of $45,667.60, plus 113.29 weeks of permanent partial general disability compensation at $440 per week in the sum of $49,847.60, for a total due and owing of $95,515.20, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $4,484.80 shall be paid at $440 per week until paid or until further order of the Director.

The record does not contain a written fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. The provision in the Award approving the attorney fee arrangement is set aside.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
Larry Shoaf, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge